

16-3877&17-8

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES G. PAULSEN, Regional Director of Region 29 of the
National Labor Relations Board, for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee-Cross-Appellant,

v.

PRIMEFLIGHT AVIATION SERVICES, INC.,

Respondent-Appellant-Cross-Appellee.

ON APPEAL AND CROSS APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ IN SUPPORT OF PETITIONER-APPELLEE-CROSS-APPELLANT JAMES G. PAULSEN

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* Service Employees International Union, Local 32BJ, hereby certifies that it has no parent companies and there is no publicly-held company that owns 10% of its stock, as it is not a corporation.

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STATEMENT OF INTEREST OF *AMICUS*¹

Amicus SEIU Local 32BJ (“Local 32BJ” or the “Union”) is the charging party in the administrative proceeding underlying the instant § 10(j) injunction and is the union with which the District Court ordered PrimeFlight Aviation Services (“PrimeFlight” or the “Employer”) to bargain. Local 32BJ participated as *amicus* before the District Court. All parties to this proceeding have consented to the Union participating as *amicus*.

SUMMARY OF ARGUMENT

Local 32BJ addresses only two points in this brief.² First, the Court has reason to believe that the National Labor Relations Act (“NLRA”), 29 U.S.C. § 151, governs PrimeFlight’s operations at JFK International Airport. In particular, the Employer has presented no argument that the Board’s position on jurisdiction is fatally flawed, frivolous or wrong. Indeed, there is ample authority in the legislative history, statutory text, and judicial and agency precedent supporting, if not compelling, the NLRB’s jurisdictional position.

Second, the District Court’s restriction on bargaining concerning hours and shifts (the “Bargaining Restriction”) constitutes an abuse of discretion.

¹ No party other than the SEIU Local 32BJ participated in authoring this brief or contributed money to fund its production.

² The Union relies on the NLRB’s cogent brief in all respects.

The District Court justified the Bargaining Restriction by the need to avoid full and permanent relief in a preliminary injunction and the need to avoid featherbedding, *i.e.*, payment for work not performed. However, Second Circuit and other precedent support full, albeit temporary, relief in injunctions ordering bargaining under §10(j), 29 U.S.C. § 160(j). A bargaining order without the Restriction is far from full relief in any event. Furthermore, Congress struck a specific balance between free collective bargaining and the danger of featherbedding by deeming shifts and schedules a mandatory subject of bargaining while making featherbedding an unfair labor practice. 29 U.S.C. § 158(b)(6). The District Court abused its discretion in contravening Congress's balance in favor of its own.

I. The NLRB's Assertion of Jurisdiction is Both Correct and Reasonable

This Court need find only that the Board's position of NLRA coverage is reasonable to reject PrimeFlight's RLA jurisdictional argument. This Court should affirm the injunction so long as the NLRB's position is not fatally flawed.

Silverman v. Major League Baseball Player Relations Comm., 67 F.3d 1054, 1059 (2d Cir. 1995); *see* Appellee-Cross-Appellant's Br., ECF No. 91 ("NLRB Br.") at 19-22.

The statute's legislative history and text support, indeed compel, the NLRB's position on jurisdiction. The Employer does not even attempt to argue that the NLRB's jurisdictional standard is impermissible under the statute. It merely asserts the insufficient claim that the NLRB's position is inconsistent with certain NMB advisory opinions. The Employer does not argue even a policy reason for rejecting the NLRB's standard, and any such argument is both waived and meritless. The recent D.C. Circuit opinion in *ABM Onsite Servs. – West, Inc. v. NLRB* (“*ABM Onsite*”), No. 15-1299, 2017 U.S. App. LEXIS 3974 (D.C. Cir. Mar. 7, 2017), likewise does not find the NLRB's position incorrect, but merely inadequately explained. Even if this Court were to find a similar deficiency in the Board's explanation, that finding would not justify denial of the injunction sought here, as the standard for the Court's review of the NLRB's request is highly deferential to the Board, and there are strong legal grounds supporting the Board's determination that the NLRA applies. PrimeFlight is covered by the NLRA because it operates as an independent contractor, and the Board's conclusion that the NLRA governs this dispute is consistent with the law.

A. The Legislative History of the RLA Supports NLRB Jurisdiction over Typical Independent Contractors

The legislative history demonstrates that Congress specifically rejected extending RLA jurisdiction to independent contractors. When Congress enacted

the RLA in 1926, it initially covered only rail “carriers.” At the time, it was the only federal legislation protecting the right to collectively bargain. Some railroads responded to the enactment of the RLA by creating wholly-owned subsidiaries in an effort to evade the Act’s strictures. *See, e.g., Reynolds v. N. Pac. Ry. Co.*, 168 F.2d 934, 941 (8th Cir.), *cert. denied*, 335 U.S. 828 (1948). Congress reacted in 1934 by amending the definition of “carrier” under RLA, Section 1, First, 45 U.S.C. § 151, First, to include companies owned or controlled by carriers. As amended, § 151, First provides in relevant part:

The term ‘carrier’ includes ... any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates ... in connection with the transportation ... of property transported by railroad ...

Joseph Eastman, the Federal Coordinator of Transportation and drafter of the 1934 amendment, had initially sought to extend the RLA to all employees doing rail transportation work, regardless of whether they worked for a carrier – *i.e.*, “to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act.” 3 Michael H. Campbell & Edward C. Brewer, III, *The Railway Labor Act of 1926, A Legislative History*, at 10. (Excerpts attached as an Appendix).

His draft would have added to the definition of “carrier” “any company operating any equipment or facilities or furnishing any service included within the definition of the terms ‘railroad’ and ‘transportation’ as defined in the Interstate Commerce Act.” *Id.* Critically, the amendment as originally proposed had no limitation requiring railroad control or ownership.

The railroads objected that the amendment would “affect their contracts for all kinds of work.” *Id.* at 145. In response to those and other railroad objections, Eastman revised the amendment with the intent to avoid “possible conflicts with N.R.A. [National Recovery Administration] codes.” *Id.* The revised amendment, which was ultimately enacted, added the operative language that remains in the Act today: “The term ‘carrier’ includes . . . any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad . . .” *Id.* Congress subsequently extended the RLA to air carriers. *District 6 v. Nat’l Mediation Bd.*, 139 F. Supp. 2d 557, 561 (S.D.N.Y. 2001).

In *R.R. Ret. Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446, 451 n.6 (1946), the Supreme Court repeatedly cited RLA legislative history to determine whether a warehouse company owned by a railroad was an employer under the Railway Retirement Act (“RRA”), 45 U.S.C. § 231 *et seq.*,³ and the Railroad

³ An “employer” under the RRA includes: “any company which is directly or indirectly owned or controlled by, or under common control with, one or more” rail carriers. § 231(a)(1)(i).

Unemployment Insurance Act (“RUIA”), 45 U.S.C. § 351 *et seq.*⁴ It did so because the RLA, RRA, RUIA, and the Carrier Taxing Act (now the Railroad Retirement Taxing Act, 26 U.S.C. § 3201 *et seq.*) form an integrated system of railway labor legislation that rely on a common definition of covered employer. *Id.* at 451. *See also Herzog Transit Svcs. v. U.S. R.R. Ret. Bd.*, 624 F.3d 467, 471-72, n.11 (7th Cir. 2010) (coverage of RLA “not materially different” than RRA); *Reynolds*, 168 F.2d at 941 (Carrier Taxing Act adopted RLA definition of carrier).

The *Duquesne* Court highlighted the gist of Eastman’s testimony on the language that was adopted — “I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation,” *id.* at 451 n.6—and Senator Robert F. Wagner’s statement that the amendment was intended to make the statute “more clearly applicable to subsidiaries of railroad companies such as refrigerator storage and other facilities.” *Id.* at 452 n.10. The Court also relied on the Senate Report’s declaration that the de facto control sustaining RLA jurisdiction “may be exercised not only by direct ownership of stock, but by means of agreements, licenses, and other devices which

⁴ An “employer” under the RUIA includes “any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith” § 351(a).

insure that the operation of the company is conducted in the interests of the carrier.” *Id.*⁵

Thus, the legislative history indicates that “control” under RLA § 151 requires carriers to maintain authority over affiliated companies similar to the legal authority of a parent over its subsidiary. This authority may be exercised indirectly through “agreements, licenses, and other devices,” but the touchstone remains whether the “operation of the company is conducted in the interest of the carrier” in contrast to the operation of a company as an independent business.

B. Textual Analysis of § 151 Supports the Board’s Position

A close analysis of the critical phrase “directly or indirectly owned or controlled by or under common control with any carrier” supports a finding that PrimeFlight is subject to NLRA jurisdiction.

This reading of “control” is made clear by the phrase “under common control with any carrier.” Courts read the phrase “common control” to refer to a legal right of control. “Necessary to a finding of common control is the existence of corporate entities . . . which are in parallel position, both controlled by a single additional corporate entity such as subsidiaries owned by a common parent.”

⁵ The report also stated that the amendment extended RLA jurisdiction to “substantially all” companies in rail transportation. *Id.* At that time, most companies in rail transportation were carriers or wholly owned subsidiaries. *Herzog*, 624 F.3d 475. But as demonstrated *infra*, RLA coverage did not extend to independent contractors, including those performing services integral to rail transport on a long-term, continuing basis.

Union Pac. Corp. v. United States, 5 F.3d 523, 526 (Fed. Cir. 1993) (quoting *Union Pac. Corp. v. United States*, 26 Cl. Ct. 739, 750 (1992)) (interpreting the Railroad Taxing Act). *See also Trans-Serve, Inc. v. United States*, 2004 U.S. Dist. LEXIS 7784 at * 10 (W.D. La. 2004), (citing cases involving common control, all of which involve an entity having a legal right of control); *Livingston Rebuild Ctr., Inc. v R.R. Ret. Bd.*, 970 F.2d 295 (7th Cir. 1992) (common control present because the same individual was a principal investor in one entity and the controlling shareholder of another); *AMR Services Corp.*, 18 NMB 348, 351 (1991) (common control exercised through holding company owning airline and contractor).

“A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.” *Powerex Corp. v. Reliant Energy Svcs., Inc.*, 551 U.S. 224, 232 (2007). Since “control” is read to mean legal right of control in the phrase “under common control,” it should have the same meaning in the phrase “directly or indirectly controlled by.”

Congress linked the terms “owned” and “controlled” in the phrase “directly or indirectly owned or controlled by.” This linkage helps define “controlled” as requiring a similar content, albeit in a different form, as “owned.” The “common sense canon of *noscitur a sociis* . . . counsels that a word is given more precise

content by the neighboring words with which it is associated.” *United States v. Williams*, 553 U. S. 285, 294 (2008).⁶

The RLA covers entities “indirectly controlled by” carriers. Congress’s use of “indirect” was intended to extend RLA coverage to controlled enterprises regardless of the form through which control is exercised, so long as the degree of control is equivalent to control exercised through ownership.⁷ “Indirect” does not indicate that the extent of control necessary for jurisdiction is lessened. This construction is consistent with the plain English meaning of “indirect.” An “indirect” route gets one to the same place as the direct route, just by a different path. Hence, Merriam-Webster Dictionary gives “roundabout” as a synonym for “indirect.”⁸ Thus, the plain language of the statute makes RLA coverage dependent upon a showing of control that is not consistent with a customer-independent contractor relationship.

⁶ In *Williams*, the Court interpreted a criminal statute concerning child pornography. It “narrowed the meaning” of two of the acts constituting criminal conduct to comport with the sense of the other words in the series. Thus, “control” means carrier power over the contractor of a similar nature as that exercised by an owner.

⁷ *Delpro Co. v. Bhd. of Railway Carmen*, 519 F. Supp. 842, 847 (D. Del. 1981), *aff’d*, 676 F.2d 960 (3d Cir.), *cert. denied*, 459 U.S. 989 (1982), is an example of “indirect” ownership or control. A group of carriers owned the stock of a company, Trailer Train. Delpro, the contractor at issue, was a wholly owned subsidiary of Trailer Train. The court, upholding an NMB determination, found RLA coverage because the contractor was “indirectly owned by a group of carriers.”

⁸ Merriam-Webster Dictionary, *Indirect*, <http://www.merriam-webster.com/dictionary/indirect> (last visited Mar. 29, 2017).

C. **The Supreme Court Decisions on Limits of RLA Jurisdiction**

In 1937 the Supreme Court made clear that independent contractors are outside the scope of the RLA. In *Virginian Ry. Co. v Sys. Fed'n No. 40*, 300 U.S. 515 (1937), a carrier was obligated to comply with an NMB certification for its own employees performing heavy repair work on rail cars because their work was sufficiently related to rail transportation to affect interstate commerce. *Id.* at 554-56. The Court acknowledged that the employees doing the same work would *not* be covered by the RLA if they were employed by an independent contractor.

It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management. *It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act.*

Id. at 557 (emphasis added).

Subsequently, in *Duquesne Warehouse Co.*, the Court explained that the “control” language in the RLA’s definition of “carrier” was aimed at corporate subsidiaries, affiliates and those under similar control. The definition was intended to embrace “affiliates” of railroads. *Duquesne Warehouse*, 326 U.S. at 451. “It then makes no difference that [transportation work] is performed by a carrier affiliate, rather than by the carrier itself.” *Id.* at 454.

D. The Lower Courts Decisions Support NLRA Jurisdiction

1. Carrier Taxing Act/Railway Retirement Taxing Act Cases

The Eighth Circuit stressed that Congress specifically decided to exclude independent contractors from the RLA and related statutes in *Reynolds v. N. Pac. Ry. Co.*, *supra*. The court in *Reynolds* found that two companies providing boarding camp and general services to railroads were not “directly or indirectly owned or controlled” by a carrier and were therefore excluded from the Carrier Taxing Act. 168 F.2d at 936. The court noted that Congress was aware of the use of “outside contractors of services such as those here involved, and it chose not to include such contract workers generally or as a class in the scope of this railroad legislation.” *Id.* at 941. Indeed, “when it was proposed in 1934 to bring all the contracting companies performing services which were an integral part in railroad transportation within the definition of a ‘carrier’ in the Railway Labor Act . . . Congress would not accept the proposal.” *Id.* (citations omitted).

Since the companies at issue in *Reynolds* had the “dignity and status of actual business enterprises,” *id.* at 935, and neither had “lost in effect its identity or status as a separate business enterprise in furnishing the services involved,” *id.*

at 940, they were outside the ambit of Carrier Taxing Act and therefore also outside the coverage of the RLA.⁹

The Third Circuit reached the same conclusion, finding that the Railroad Retirement Act did not cover employees of independent contractors in *Martin v. Fed. Sec. Agency*, 174 F.2d 364 (3d Cir. 1949). The contractor operated grain elevators for the railroad in a long term relationship integral to the transportation of grain. *Martin v. Fed. Sec. Agency*, 73 F. Supp. 482, 484 (W.D. Pa. 1947). The Circuit Court stated:

We do not think that the Congress intended to exclude widows and orphans of the employees of independent contractors of carriers from the benefits of the Act, but only that it sought by Sec. 1532, and kindred sections, to prevent carriers from escaping the obligations laid upon them in the Railroad Retirement Act and the Carrier Taxing Act by the devices of organizing separate and distinct companies or contracting with companies over whose business policies and operations it, by various means, had the *definite legal right to control*.

174 F.2d at 367 (emphasis added).

The court found a lack of control, stressing that the arrangement between the railroad and the independent contractor was not “uncommon.” *Id.* The court was “favorably impressed” with the understanding that control

has reference to the control of a company attained through financial arrangements, stock ownership, voting trust, interlocking directorates,

⁹ Subsequently, in *Kelm v. Chicago, St. P., M & O Ry. Co.*, 206 F.2d 831 (8th Cir. 1953), the Court confirmed that the 1947 amendments to the Railroad Retirement Taxing Act did not bring independent contractor companies under the railway legislation, as discussed *infra*.

and other corporate and business devices which have regard to its management, business policies, or corporate functions. Railroad Retirement Board Regulation 202.4 [codified at 20 C.F.R. 202.4] defines such control as the “mean, method or circumstances, irrespective of stock ownership, to direct . . . the policies and business of such a company . . .”

Id. at 366.

In *Nicholas v. Denver & RGWR Co.*, 195 F.2d 428, 433 (10th Cir. 1952) and *Kelm v. Chicago, St. P., M. & O. Ry. Co.*, 206 F. 2d 831 (8th Cir. 1953), the courts again held that the Carriers Taxing Act did not cover independent contractors.

These courts noted that Congress also specifically rejected covering independent contractors in 1946, when it amended the Carriers Taxing Act through the Railroad Retirement Taxing Act.

While the bill as originally introduced was intended among other things to bring independent contractors of that kind and their employees within the purview of the legislation, and whatever the purpose of Congress may have been in other respects, the legislative history indicated clearly that the final action of Congress represented a deliberate intent and purpose to leave such contractors and their employees outside the scope of the act insofar as employment taxes were concerned.

Nicholas, 195 F.2d at 433; *see also Penn. R. R. Co. v. United States*, 70 F.

Supp. 595 (Ct. Cl. 1947) (independent contractor not covered by Carrier

Taxing Act even though for many years it performed work integral to rail

transport, all of the equipment was owned by the carrier, the work was

performed under the general supervision of the carrier and the carrier had the

power to remove contractor employees); *New England Freight Handling v. Hassett*, 33 F. Supp. 610 (D. Ma. 1940) (freight handler not covered by Carrier Taxing Act because it was an independent contractor); cf. *Wabash R.R. Co. v. Finnegan*, 67 F. Supp. 94, 100 (E.D. Mo. 1946) (carrier controlled sham independent contractor that provided no equipment, made no investment, provided no supervision, visited work site only once or twice a year, and performed work for that carrier only while the carrier kept the payroll records for the contractor's ostensible employee), *aff'd*, 160 F.2d 891 (8th Cir. 1947).

The Second Circuit and many other courts have stressed that the RLA was amended to prevent carriers from evading the RLA by means of subsidiaries and similar corporate manipulations. The amendments swept these subsidiaries into the Act's coverage, but did not extend coverage to genuine independent contractors. *Despatch Shops, Inc. v. R.R. Ret. Bd.*, 154 F.2d 417, 419 (2d Cir. 1946) (railway legislation applies to nominally independent companies that are in reality "wholly owned corporate affiliates"). *See also Herzog*, 624 F.3d at 472 ("control" language was intended "to prevent railroads from avoiding the Act by creative corporate structuring" and to prevent carriers from "remov[ing] most of their workers from the Act simply by setting up a wholly owned subsidiary"); *Thibodeaux v. Executive Jet International, Inc.*, 328 F.3d 742 (5th Cir. 2003)

(control language was intended to prevent carrier evasion of the RLA by “spinning off components of its operation into subsidiaries or related companies”); *Pan Am. World Airways, Inc. v. United Bhd. of Carpenters*, 324 F.2d 217, 220 (9th Cir. 1963), *cert. denied*, 376 U.S. 964 (1964) (control test intended to prevent railroads from avoiding RLA through “subsidiary or controlled enterprises”).

2. NLRA and FLSA Cases Support NLRA Jurisdiction

The one Court of Appeals decision which has analyzed RLA jurisdiction over airport independent contractors applied a narrow reading of the “control” language. In *Dobbs House, Inc. v. NLRB*, 443 F.2d 1066 (6th Cir. 1971), the Sixth Circuit enforced a NLRB decision finding an in-flight caterer to be under NLRA jurisdiction. The carriers provided “detailed instructions” as to how the caterer’s employees should perform their work, had “unlimited access to every phase of the catering operations,” gave direct orders to the employees on occasion, and had the right to and did in fact on ten occasions have objectionable contractor employees removed at various airports. *Id.* at 1069-70. Yet, because the carriers had no authority to discipline the caterer’s employees and did not “hire, promote, demote or control the pay, hours, shifts or working conditions,” the court held that the carriers did not exercise sufficient control over the contractor to bring it under the coverage of the RLA.

The *Dobbs House* court contrasted the facts before it to cases in which jurisdictionally significant carrier control was present. It distinguished cases involving wholly-owned subsidiaries, including one in the air industry. *Id.* at 1070-71. It also distinguished a case in which the contractor could do no work for any other company without the permission of the controlling carrier and the controlling carrier covered the losses and shared in the profits of the contractor. *Id.* at 1071. Finally, it distinguished a case in which the contractor was permitted to perform services only for a single carrier, which carrier provided all of the premises and equipment and paid part of the salaries of some of the contractor's employees. *Id.* at 1071-72. In contrast, Dobbs House sold "its services to whomever it will and can," and thus did not have an exclusive contracting relationship with any particular airline or airline consortium. *Id.*¹⁰

In recent years, three district courts have examined airline control, and all found independent contractors outside RLA jurisdiction. The court in *Air Serv Corp. v. SEIU Local 1*, No. 16-10882, 2016 U.S. Dist. LEXIS 166437 (E.D. IL Dec. 2, 2016) rejected the employer's request for an injunction against a strike under the RLA after finding no evidence of control greater than that found in a typical contractor relationship. In *Roca v. Alphatech Aviation Services, Inc.*, 961

¹⁰ The *Dobbs House* opinion did not mention any decision finding carrier control, as opposed to ownership, over an independent airport contractor, strongly suggesting that there was no such case at the time.

F. Supp. 2d 1234 (S.D. Fl. 2013), the district court rejected a contractor's assertion of the exemption from overtime premiums for RLA covered workers, 29 U.S.C. § 213(b)(3). The court stressed that "[m]eticulous work instructions and prior approval of an independent contractors' employees will not convert those employees into a carrier's employees for RLA purposes." *Roca*, 961 F. Supp. 2d at 1239-40. "If the Court were to equate this dependence on client demand with 'control,' the RLA exemption to FLSA's overtime requirement would embrace a large and heretofore undefined swath of non-air carriers" *Id.* See also *Cunningham v. Elec. Data Sys. Corp.*, No. 06-3530, 2010 U.S. Dist. LEXIS 32112 (S.D.N.Y. Mar. 30, 2010) (rejecting RLA exemption to FLSA as a defense).

E. NMB's Decisions Support NLRA Jurisdiction over Independent Contractors

The NMB affirmed that the "typical independent contractor" was not under RLA jurisdiction in *Airway Cleaners, LLC*, 41 NMB 262 (2014). *Airway Cleaners* was but one in a consistent line of recent cases.¹¹ *Airway Cleaners* is consistent with NMB decisions reaching back to the 1950s. See, e.g., *Sabena Belgian World Airlines*, 3 NMB 25, 25 (1956) (no jurisdiction over employees because the caterer-employer operated as an "independent contractor" even though the chef

¹¹ *Menzies Aviation, Inc.*, 42 NMB 1 (2014); *Aero Port Services, Inc.*, 40 NMB 139 (2013); *Bags, Inc.*, 40 NMB 165 (2013); *Huntleigh USA Corp.*, 40 NMB 130 (2013); *Air Serv Corp.*, 39 NMB 450 (2012), *reconsideration denied*, 39 NMB 477 (collectively, the *Airway Cleaners* Cases").

was a Sabena employee and Sabena provided the kitchen facilities and vehicles); *Great Lakes Airlines*, 4 NMB 5 (1961) (no jurisdiction because employees work for and receive compensation from contractor and are not carrier employees); *Pinkerton's*, 5 NMB 255, 257 (1975) (no jurisdiction because contractor was “an independent corporation, its airline related activities are clearly *de minimis* and therefore the employees are its employees and not those of the involved air carriers”); cf. *Thaddeus Johnson Porter Service, Inc.*, 3 NMB 81, 83, (1958) (RLA jurisdiction over a captive contractor which was not a profit-making enterprise and whose right to seek business was “completely restricted by the 11 air carriers” in the controlling consortium because “unlike most corporations, the final decision to accept new business rests not with the [contractor] Company but with the recipients of the Company’s services”); *Ohio & Western Pa. Dock Company*, 4 NMB 285, 287-88 (1967) (RLA jurisdiction over a company that did work for only a single carrier because it was “unlike the ordinary independent contractor.”).¹²

Thus, in *Miami Aircraft Support*, 21 NMB 78, 82 (1993), the NMB found no jurisdiction because the contractor (“MAS”) was a typical independent contractor.

There is no evidence that a carrier or carriers control the manner in which MAS does business. MAS is an independent company, which contracts with air carriers through a competitive bidding process. MAS controls its own budgets and expenditures, and is responsible for its own profitability. The carriers do not have access to MAS

¹² The NMB confirmed that it had never extended RLA jurisdiction beyond carriers and their subsidiaries by declining to “hypothesize” on whether it could do so. *Id.*

business or personnel records, except for training records which are checked periodically to verify compliance with FAA regulations and contract terms.

In *Dynamic Science, Inc.*, 14 NMB 206, 206 (1987), the NMB rejected jurisdiction because the contractor “pays all wages and benefits” and “directly supervise[s] the employees, impose[s] discipline and do[es] the hiring and firing.” See also *CFS Air Cargo, Inc.*, 13 NMB 369, 369 (1986) (even though airline instructed contractor employees on certain tasks, no RLA jurisdiction because contractor “pays the employees and provides the benefits” and the airlines have “no control over hiring or firing”).

PrimeFlight’s General Terms Agreement with JetBlue specifies that PrimeFlight’s employees “will be considered employees of [PrimeFlight] for all purposes and under no circumstances be deemed to be employees of JetBlue.” JA369, ¶ 9.3. PrimeFlight is an independent contractor. JA380, § 22.5. Many NMB decisions have relied on similar clauses in rejecting RLA jurisdiction. The contractor-carrier contract specified that the employees were “*exclusively under the direction and control*” of the contractor, which was “*an independent contractor in every respect.*” *Allied Maintenance Corp.*, 13 NMB 255, 256 (1986) (emphasis in original). In *Ogden Aviation Services*, 20 NMB 181, 184 (1993), the NMB found that a contract specifying that the contractor is the employer of its employees and that the carrier has no role in supervision “illustrates lack of significant direct or

indirect control,” even though the contract permitted the carrier to remove objectionable contractor employees. *See Andy Frain Services*, 19 NMB 161 (1992) (same); *Stanley Smith Security*, 16 NMB 379, 381 (1989) (security company is designated as an “independent contractor” which has “complete control” over personnel).

The NMB found it jurisdictionally significant that a contractor had its own labor relations and personnel policies which it formulated independently of the carriers and which it applied regardless of the particular carrier account for which an employee worked. *Ebon Services*, 13 NMB 3, 4 (1985) (personnel policies set independently of carriers and embodied in Ebon’s personnel manual); *Ogden Aviation Services*, 23 NMB 98, 103-07 (1996) (employee handbook contains policies and procedures, including three-step disciplinary procedure, and had no carrier input, demonstrating independent decision making.¹³

The NMB found no RLA jurisdiction when the contractor “appears to have a substantial supervisory and managerial complement indicating that it independently supervises its employees.” *Flight Terminal Security Co.*, 16 NMB 387, 396 (1989). “Sporadic or incidental” supervision by carriers is not significant. *Globe Security Systems*, 16 NMB 208, 212 (1989).

¹³ In the instant case, the ALJ’s Decision noted the Employer’s Handbook and described some of the policies contained therein. ALJ Decision, NLRB Br. Add. at 8.

F. NLRB Decisions Support Jurisdiction over Independent Contractors

The NLRB embraced the *Airway Cleaners* cases in *Allied Aviation*, 362 NLRB No.173, 2015 NLRB LEXIS 618 (Aug. 19, 2015), *appeal docketed*, No. 15-1321 (DC Cir. Sept. 11, 2015). As with the NMB, the Board's position is consistent with a robust line of NLRB cases rejecting RLA jurisdiction over independent contractors. In addition to *Dobbs House*, in *Marriott In-Flite Services*, 171 NLRB 742 (1968), the Board adopted the ALJ opinion finding NLRA jurisdiction over an airline caterer. The ALJ wrote: "[C]ontrol does not mean simply specifications in some detail as to the nature of the services to be performed and the method used, but control of the management and business policy of the subordinate company." *Id.* at 752. The ALJ cited many cases in which the NLRB had asserted jurisdiction over airport independent contractors, *id.* at 750 n.11, and no NMB case finding RLA jurisdiction if common ownership was absent. *Id.* at 751 n.16. *See also Hot Shoppes, Inc.*, 143 NLRB 578, 580 (1963) (no RLA jurisdiction since contractor's employees are not employees of carrier even though the carrier directed their work while they are on the airfield); *Wings & Wheels, Inc.*, 139 NLRB 578, 580 (1962), *enf'd*, 324 F.2d 495 (3d Cir. 1963) (company that forwarded freight by truck to and from airlines not under the RLA, because not itself a common carrier by air); *D & T Limousine*, 207 NLRB 121 (1973) (no RLA

jurisdiction over independent contractor even though contractor had no on-site supervision).

G. The Employer's Arguments Against Jurisdiction Are Meritless

The Employer argues against NLRA jurisdiction, asserting that: 1) this Court owes no deference to the NLRB; and 2) the *Airway Cleaners* Cases are inconsistent with some earlier NMB opinions.

1. Deference To the NLRB Is Appropriate

The Employer attacks the District Court's reference to *Chevron* deference as inappropriate because there is no final Board decision in a § 10(j) case. Appellant-Cross-Appellee's Br. ("Employer's Br."), Doc. No. 75 29-31. The Employer may be asserting that deference is inappropriate because there is no final decision. Yet the Employer concedes that the "reasonable cause to believe" standard applies to the NLRB's § 10(j) request, Employer's Br. 25, and there are never final NLRB decisions in § 10(j) cases. The Employer may be arguing that the District Court's reference to *Chevron* deference invalidates its conclusions. But, as the Board explained in its brief, NLRB Br. 33-34, the reasonable cause to believe standard of § 10(j) cases is more deferential than the *Chevron* standard. The District Court was obligated to apply the "reasonable" cause standard; thus, any imprecision in the District Court's reference to *Chevron* is inconsequential.

The Employer also attacks deference to the NLRB because it is allegedly interpreting a different statute, not its own. Employer's Br. 31. However, the NLRB is interpreting the jurisdictional reach of its own statute in drawing the line between the NLRA and the RLA. Under *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), courts treat agency decisions on jurisdiction with the same deference as is appropriate to other issues. The issue is whether the agency is acting within Congressional authorization. The distinction between jurisdiction and other issues is ephemeral. *See also UPS v. NLRB*, 92 F.3d 1221, 1225 (D.C. Cir. 1996); *Dobbs House*, 443 F.2d at 1072 (NLRB has statutory authority to resolve issue of NLRA or RLA jurisdiction; no hierarchy placing NMB ahead of NLRB). Moreover, the NLRB is applying the NMB's test as expressed in the *Airway Cleaners* Cases.

2. Employer Tacitly Concedes That the NLRB's Position Is Permissible

The Employer makes no argument that the NLRB's jurisdictional position is impermissible under the statute. While it argues at length that the *Airway Cleaners* cases are inconsistent with certain prior NMB opinions, nowhere does it argue why the *Airway Cleaners* cases violate Congressional intent or even why the opinions on which PrimeFlight relies better implement the Congressional scheme. This lack is even more glaring because the Employer relies on an article by the undersigned arguing the validity of the *Airway Cleaners* Cases. Employer's Br. 34, citing Brent Garren, *NLRA and RLA Jurisdiction over Airline Independent Contractors: Back*

on Course, 31 A.B.A. J. Lab. & Emp. L., 77 (2015). *Back on Course* argues that the *Airway Cleaners* standard implements Congressional intent, while the NMB/NLRB cases finding broad NLRA coverage contravene Congress' will. PrimeFlight musters not a single word to dispute any of the analysis in *Back on Course*. Accordingly, it tacitly concedes that the NLRB's position is within its statutory authority, the issue before this Court.

The Employer claimed before the District Court that the RLA policy of minimizing strikes supported broad RLA coverage over contractors involved in air transportation. The District Court rejected this argument, noting that PrimeFlight's argument emphasizes the "function factor to the detriment of the substantial control factor." SPA9. The Employer failed to raise this argument in its brief and has therefore waived it. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1988) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.").

3. Inconsistency with Some Prior NMB Cases Is Not Grounds to Set the Injunction Aside

The Employer argues that the *Airway Cleaners* cases are inconsistent with NMB certain advisory opinions, particularly those in the window from 1997-2011. Employer's Br. 32-37. The D.C. Circuit's opinion in *ABM Onsite* finds inconsistency as well. Critically, the D.C. Circuit merely remanded to the NLRB for an adequate explanation of its decision finding NLRA jurisdiction over an

airport contractor. The Court did not find that the Board was mistaken concerning jurisdiction. To the contrary, it found that the NLRB “could fairly read recent NMB opinions to require greater carrier control over personnel matters than the record evinced” in *ABM*. *ABM Onsite*, slip op at 18. The remand merely requires the Board to explain why it has followed more recent NMB cases rather than earlier cases. The NLRB is free to sustain its decision finding jurisdiction by providing a rationale supporting its purported departure from precedent. *Id.*, slip op. at 19. Nothing in *ABM* suggests that the NLRB’s reliance on the *Airway Cleaners* Cases is frivolous, fatally flawed or wrong.

In addition, the facts of *ABM* show far greater carrier control than those found by the District Court in the instant case. In *ABM Onsite*, the airlines provided all training manuals used by the contractor. *ABM Onsite*, slip op. at 6. Here, however, PrimeFlight provides its own training manuals, and JetBlue merely has the right to inspect PrimeFlight’s manuals. SPA10. In *ABM*, the contractor’s employees wore uniforms bearing the logo of the airline consortium. *ABM Onsite*, slip op. at 6. PrimeFlight’s employees wear uniforms bearing PrimeFlight’s logo, clearly distinguishing them from JetBlue’s own employees. SPA10. Further, PrimeFlight’s contract with JetBlue calls for PrimeFlight to provide all equipment and office space, while in *ABM*, the contract specified that the airline consortium was to provide most equipment and office space. JA369; *ABM Onsite*, slip op. at

6. Perhaps most significantly, the airline consortium in *ABM* exerted much more substantial control over its contractor's personnel decisions. There, the consortium had the right to approve all staffing plans, approve overtime, direct that employees be removed from the contract (seemingly for any reason), and to approve changes in the contractor's "key personnel." *ABM Onsite*, slip op. at 6. By contrast, JetBlue exerts much more limited control over PrimeFlight's personnel decisions. As the District Court noted, pursuant to the contract between JetBlue and PrimeFlight, JetBlue has no "unilateral right of removal" of a PrimeFlight employee. SPA11. Rather, the contract provides a much narrower removal right: if a PrimeFlight skycap is found accepting tips outside the system, JetBlue has the right to request the employee's removal *as a skycap*. *Id.* JetBlue can also request employee removal if the employee is involved in a work stoppage. *Id.* There is no general right of removal comparable to that possessed by the airline consortium in *ABM*. JetBlue holds a much more circumscribed form of control over the vitally important areas of hiring, firing and discipline than the airline consortium in *ABM Onsite*. In short, *ABM* provides no comfort for the Employer in the instant case.

II. The Restriction on Bargaining over Shifts and Hours is an Abuse of Discretion

The NLRB persuasively argued that the restriction on reaching an agreement on "minimum shift or employee requirements" ("Bargaining Restriction") is

contrary to the policies of the NLRA, undermines free collective bargaining and imposes on the Union the injury that a § 10(j) bargaining order is designed to prevent. NLRB Br. 53-63. We argue here that the District Court's rationale for the Bargaining Restriction is erroneous as a matter of law. The District Court asserted that the Bargaining Restriction is justified as necessary to avoid "essentially award[ing] petitioner complete and permanent relief" and to "protect PrimeFlight from unduly burdensome obligations and costs" SPA21. These purported justifications are based on premises that contradict applicable law.

A. Bargaining Restriction Is Not Justified by Need to Avoid Awarding Complete Relief

Avoiding complete relief is no basis for the Bargaining Restriction both under precedent and because the injunction would not award complete relief absent the Bargaining Restriction. This Court finds that awarding essentially the same relief in a § 10(j) proceeding as that which would be granted by a final Board order is warranted. "Where . . . an equity court has 'reasonable cause' to believe that particularly flagrant unfair labor practices have been committed, the court's fashioning of those remedies typically framed by the Board in an unfair labor practice proceeding is 'just and proper,' even though a final decision by the Board is pending." *Morio v. N. Am. Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980) (affirming injunction requiring bargaining and rescinding unlawful changes to

terms and conditions of employment). The *Morio* court stressed that: “[a]ggressive remedial relief is necessary in appropriate labor cases.” *Id.* This Court has repeatedly affirmed § 10(j) injunctions ordering bargaining without imposing any restriction on its scope. *E.g.*, *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360 (2d Cir. 2001); *Major League Baseball*, 67 F.3d 1054; *Kaynard v. Mego Corp.*, 633 F.2d 1026 (2d Cir. 1980); *Seeler v. Trading Port, Inc.*, 517 F.2d 33 (2d Cir. 1975).

In *Frankl ex rel. NLRB v. HTH Corp.*, the Ninth Circuit stated:

[I]n most bad-faith bargaining cases, a § 10(j) remedy *will* be identical, or at least very similar, to the Board's final order. This precept follows from the nature of interim § 10(j) relief and of the Board's final remedial power.

The purpose of § 10(j) relief is to preserve the Board's remedial power. The task of the Board in devising a final remedy is to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice. Very often, the most effective way to protect the Board's ability to recreate such relationships and restore the status quo will be for the court itself to order a return to the status quo.

650 F.3d 1334, 1366 (9th Cir. 2011) (internal citations and quotation marks omitted).

The District Court's assumption that the injunction without the Bargaining Restriction would provide the same relief as an NLRB final order was simply

wrong. Thus, the ALJ decision requires the Employer to rescind the unilateral changes to terms and conditions of employment that it had imposed. ALJ Decision, NLRB Br. Add. at 21 and it requires the Employer to cease and desist from threatening employees with discharge because they engage in Union activities. *Id.* at 18, 20. Neither of these remedial orders is contained in the injunction, and the NLRB sought neither from the District Court. The relief awarded by the District Court was temporary, as well as being partial. Any collective bargaining agreement would become unenforceable if the NLRB found it lacked jurisdiction over the matter.

B. The District Court Disregarded Congress's Balance Between Encouraging Bargaining and Preventing Featherbedding

The Bargaining Restriction also improperly alters the balance struck by Congress between encouraging collective bargaining and the danger that collective bargaining would result in “featherbedding”, *i.e.*, requiring employers to pay idle workers. In its Memorandum Decision denying the Regional Director’s Emergency Motion to Amend the Judgment, the District Court rationalized the Bargaining Restriction because the Union would seek to “dictate staffing levels over the needs of JetBlue to the unnecessary expense of PrimeFlight” and would “bargain for unnecessary staffing.” SPA31. Later, the District Court explains more explicitly that the Provision is The District Court feared that “the NLRB [is] . . . attempting to use § 10(j) to pressure PrimeFlight into an agreement under

which it will pay union workers for time in which they are not working.” SPA34; *see also* SPA30-31.¹⁴

Thus, the District Court decided that the Bargaining Restriction struck the appropriate balance between encouraging collective bargaining and avoiding featherbedding by simply forbidding bargaining on shifts and hours. But Congress specifically considered this question and fashioned a very different solution. Congress outlawed featherbedding, including attempts to cause featherbedding. *See* 29 U.S.C. § 158(b)(6). Congress declared it an unfair labor practice for a union “to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.” *See also Am. Newspaper Publishers Ass’n v. NLRB*, 345 U.S. 100, 110-11 (1953) (discussing the history of featherbedding and legislative intent in banning the practice). At the same time, Congress specifically required employers to bargain over hours of work. *See* 29 U.S.C. § 158(a)(5) (unfair labor practice for employer to refuse to bargain collectively) and 29 U.S.C. § 158(d) (defining “collectively bargain” to include negotiations over, *inter alia*, hours). The Supreme Court has held that:

the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well

¹⁴ Nothing in the record indicates that the Union would seek, or that the Employer would agree, to excessive staffing.

within the realm of ‘wages, hours, and other terms and conditions of employment’ about which employers and unions must bargain.

Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 691 (1965) (quoting NLRA § 8(d)). The NLRB has consistently held that scheduling and working hours are terms and conditions of employment constituting mandatory subjects of bargaining. *See, e.g., Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 837-38 (enforcing the Board’s decision that implementation of a new schedule constituted an unlawful unilateral change in terms and conditions of employment; *Tuskegee Area Transp. Sys.*, 308 NLRB 251, 251-52 (1992) (finding an employer’s failure to bargain over requiring employees to work double shifts a violation of § 8(a)(5)), *enf’d*, 5 F.3d 1489 (11th Cir. 1993); *Buck Creek Coal, Inc.*, 310 NLRB 1240, 1242-43 (holding that an employer must bargain over a change from fixed to rotating shifts); *Rangaire Acquisition Corp. & GSL Rangaire Corp.*, 309 NLRB 1043, 1045-46 (1992) (finding that an employer was required to bargain over a change from a five-day schedule to a four-day schedule). The District Court abused its discretion in disregarding and altering the balance struck by Congress between bargaining and featherbedding.

CONCLUSION

Amicus SEIU Local 32BJ respectfully submits that this Court has ample grounds to affirm the District Court’s injunction. The Employer’s argument

concerning jurisdiction does not even attempt to show that the NLRB' finding jurisdiction is fatally flawed, frivolous or wrong. The Employer says nothing to counter the legislative history, statutory text and decades of precedent supporting NLRA jurisdiction. Its claim that NLRA jurisdiction is inconsistent with certain earlier NMB cases fails to provide grounds to dissolve the §10(j) injunction.

The Union also respectfully submits that this Court should modify the injunction by eliminating the Bargaining Restriction. The rationale for the injunction contravenes the Congressional balance between collective bargaining and the dangers of featherbedding. The Restriction may not be justified in order to avoid awarding complete relief, as such relief is appropriate in bargaining order § 10(j) cases and the injunction would not remedy PrimeFlight's unilaterally imposed changes to terms and conditions of employment or its unlawful threats even if the Bargaining Restriction were to be removed.

Dated: March 29, 2017

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 7,517 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a 14 point, proportionally spaced typeface.

Dated: March 29, 2017

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APPENDIX

**THE RAILWAY LABOR ACT
OF 1926
A Legislative History**

Edited by
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and
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Volume 3

Published for
ABA SECTION ON LABOR AND EMPLOYMENT LAW

by
William S. Hein & Company
1285 Main Street
Buffalo, New York
1988

TO AMEND THE RAILWAY LABOR ACT

9

If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within 30 days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

"(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession."

Sec. 6. Section 6 of the Railway Labor Act is amended to read as follows:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change effecting rates of pay, rules, or working conditions, and the time and place for conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Sec. 7. The Railway Labor Act is amended by striking out the words "Board of Mediation" wherever they appear in sections 7, 8, and 10 of such Act, and inserting in lieu thereof the words "Mediation Board."

The CHAIRMAN. Mr. Eastman has come down this morning to be heard on this measure, and you can go ahead, Mr. Eastman.

STATEMENT OF HON. JOSEPH B. EASTMAN, FEDERAL COORDINATOR OF TRANSPORTATION

Mr. EASTMAN. My name is Joseph B. Eastman, and I am Federal Coordinator of Transportation. I appear in support of this bill, Senate 3266.

Mr. Chairman, I have prepared a rather brief, compact statement, intended to give a birdseye view of the bill, and with your permission I will go ahead with that.

The CHAIRMAN. Go ahead.

Mr. EASTMAN. When the Transportation Act, 1920, was enacted, following the return of the railroads to their private owners after the period of Federal control, an effort was made to provide for the orderly adjustment of labor controversies with the aid of a governmental agency. The Railroad Labor Board was created for that purpose, and the intent was that it should occupy much the same field in the settlement of disputes between the railroads and their employees as the Interstate Commerce Commission occupied in the settlement of disputes between the railroads and their patrons. The Labor Board functioned for a period of about 6 years, but the results were satisfactory neither to the railroads nor to the employees. The trouble was that while it followed the general pattern of the Inter-

state Commerce Commission, and was designed to be an impartial Government tribunal for the settlement of disputes, this Labor Board was given no authority to enforce its decisions, and in that respect differed radically from the Interstate Commerce Commission.

It seemed apparent that one of two things should be done—either the Labor Board should be given real authority, or it should be disbanded and the settlement of disputes left to a procedure of conference and negotiation between the railroads and their employees with the aid of a governmental agency designed solely for mediation purposes. The latter course was followed and resulted in the present Railway Labor Act. That act was worked out in conference between representatives of the railroads and representatives of the employees and was favored by both sides. It was frankly an experiment, dependent largely upon the good faith and good will of the parties, the skill of the Government mediators, and, in the last analysis, the power of public opinion informed in emergencies by a Presidential fact-finding board. The act prescribed a definite procedure for collective bargaining by independent parties freed from interference, influence, or coercion, and set up machinery for mediation, arbitration, and fact finding; but it provided no penalties or other specific means of enforcing the duties which were imposed. The two parties wished to see the experiment tried; they were very hopeful of good results; but neither was sure of the outcome.

This Railway Labor Act has now been tried for a period of nearly 8 years. It has served a very useful purpose and has brought about many good results, but experience has shown that it is in need of improvement. The bill before you, S. 3266, proposes such improvements. It does not depart from the general principles of the present Railway Labor Act, but, instead, is designed to reinforce those principles and provide for their more effective application. It seeks not to overturn but to perfect what has been done.

I am ready to answer any questions as to the details of the bill to the best of my ability, and before I conclude shall present certain amendments which I believe should be made. Doubtless other improvements in language will be found desirable. Before I get to details, however, I wish to indicate to you what are the salient features of the bill.

In the paragraph of section 1 marked "First", there is a change in the present definition of the term "carrier." This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occasion contracted out their maintenance work on equipment and even on way and structures. The thought is that concerns which function in this way as an integral part of the railroad transportation system should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves and as the express and sleeping-car companies. This object is attained by including in the definition of "carrier" any company "operating any equipment or facilities or furnishing any service included within the definition of the terms

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'railroad' and 'transportation' as defined in the Interstate Commerce Act." Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose.

I may say that in reading that over last night I am not sure the language does cover all companies to which railroads on occasion have contracted out their maintenance work, and it perhaps should be examined rather carefully from that point of view.

The CHAIRMAN. I am impressed with the fact that instead of defining the terms in this bill you have defined them as defined in some other bill.

Mr. EASTMAN. Yes.

The CHAIRMAN. That is rather poor legislation, isn't it, generally?

Mr. EASTMAN. Well, the definitions in the Interstate Commerce Act are, of course, definitions of long standing.

The CHAIRMAN. I am not objecting to it; I am wondering if they should not be written into this bill.

Mr. EASTMAN. That might, perhaps, be better. Some paraphrasing would have to be done if that were done in that way.

The CHAIRMAN. The very fact it would have to be done is a reason that it should be done. If you define the terms of one act by another act, everybody has to dig it up.

Mr. EASTMAN. I am not sure the language as it stands does cover all that it is intended to cover. I shall be glad to give it further consideration, and to indicate later any changes which I think ought to be made.

As I have already indicated, it is an essential feature of the present Railway Labor Act that the two parties which engage in collective bargaining shall be truly representative of the interests which they purport to represent and wholly independent of each other. This purpose is reflected in the paragraph of section 2 marked "Third", which reads as follows—

Senator WAGNER. You do not agree that this is realistic bargaining where one side controls both sides of the table.

Mr. EASTMAN. No, indeed.

Senator WAGNER. I brought for myself a shower of protests because I made that assertion once.

Mr. EASTMAN (reading):

Third. Representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

While this provision stated a noble purpose, it has not proved to be self-enforcing, and the act provided no other means of enforcement. Consequently the purposes were not accomplished. Perhaps I should say it was not entirely accomplished. It has been accomplished in part. This failure has already been twice recognized by Congress in other and more explicit provisions which it has inserted in other statutes. The first recognition was in the amendment to the Bankruptcy Act, which became law on March 3, 1933. I quote paragraphs (p) and (q) of section 77 of that amended act, which read as follows:

(p) No judge or trustee acting under this act shall deny or in any way question the right of employees on the property under his jurisdiction to join the labor

STATEMENT OF JOSEPH B. EASTMAN, FEDERAL COORDINATOR
OF TRANSPORTATION—Resumed

Mr. EASTMAN. Mr. Chairman, I have been over the testimony at these hearings, which you have been kind enough to send me, and have endeavored to consider all of the amendments to the bill which have been presented. I have a written statement here which discusses those amendments in a concise way. I understand that you wish to hurry along this morning, and if I may have the privilege of having the entire statement copied in the record, I shall confine my reading to comments which seem to me to be of particular importance.

The CHAIRMAN. You may go ahead with your statement, and what you do not present before we have to adjourn this morning, we will print at the close of your testimony.

Mr. EASTMAN. I shall discuss, first, the amendments to S. 3266 which have been proposed by the railroads.

Section 1, paragraph first: The railroads wish to strike out the words "any company" in line 10 of page 1. This amendment would confine the bill to the employees of express companies, sleeping-car companies, and railroads. It would eliminate companies, like refrigerator-car companies, which operate facilities or furnish service, forming a part of railroad transportation. Most of the illustrations given by Mr. Clement to support his objections to the words "any company" relate to construction work. The language in the bill would not cover outside companies engaged in such work for the railroads, as I read it. He is right in believing that it would cover trucking companies performing terminal service for the railroads. However, he approves of the wording of the present act, and that includes "other transportation facilities used by or operated in connection with any such carrier by railroads". It is plainly broad enough to cover terminal trucking.

The CHAIRMAN. As I recall it, he claimed that it would affect their building of bridges and affect their contracts for all kinds of work. Is that your understanding of the definition?

Mr. EASTMAN. Well, as I read the definition in the bill, as I have said here, I do not think it would cover such construction work. However, I am about to propose an amendment.

While I believe that the railroad objections are largely without basis, the chairman has made a valid criticism of the definition of "carrier" now in the bill, because it requires reference to another act. I can also see difficulties in bringing in trucking operations and certain other operations performed for railroads by outside companies, because of possible conflicts with N.R.A. codes. It is difficult to know just where to draw the line. I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation. So changed, the definition would read:

The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.

That, I may say, is some of the language in the Interstate Commerce Act.

The CHAIRMAN. Is there some difference, however? Isn't this reference here to parent, subsidiary, and affiliated, new?

Mr. EASTMAN. Yes. I am confining this now to the railroad subsidiaries because of the possible conflict with N.R.A. codes if we get into the outside field. Going on with that—

and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such carrier.

Now I come to section 1, paragraph 2: The railroads wish to amend lines 13 to 14 on page 2 so that the term "Adjustment Board" would mean any one of the boards of adjustment provided for in this act, instead of the National Board of Adjustment alone. While the bill does not prevent the setting up of regional or system boards of adjustment, the only board which it creates is the National Board of Adjustment, and the proposed amendment would lead to nothing but confusion, unless section 3 were changed as the railroads propose. As I do not favor the latter change, I oppose this amendment on page 2.

Section 1, paragraph 6: The railroads wish to amend the definition of "representative" by adding in line 23 of page 3 the words "severally or collectively". They say that it will "afford equal opportunity to every employee, collectively or individually."

This amendment must be read in connection with other proposed changes, hereinafter noted, which introduce the words "groups of employees". These changes would lead to all manner of confusion, controversy, and internal strife among employees.

The theory of collective bargaining is that employees cannot deal on equal terms with the employer unless they organize. They must deal collectively rather than individually. They may subdivide into crafts or classes, if desired, but whether the organization represents all of the employees or a craft or class, it should be set up by the majority, just as our National Government is set up, or a State or municipal government. Recently the idea has emerged, and apparently it is the idea behind these railroad amendments, that organizations representing the minority as well as the majority ought to be recognized. In any class or craft, therefore, part of the employees might be represented by a national union, if this idea prevailed, part by a company union and still another part by a communist organization.

This idea, in my judgment, is based on the principle "united we stand, divided we fall". It can only cause trouble and confusion. The minority ought to have every opportunity to air their views. As one who has dissented frequently in the past, I am strong for that; but yet I believe in the rule of the majority. Government cannot be subdivided into factions—and the labor union is really a form of government. Any class or craft of employees cannot deal effectively in parts with an employer. Our Civil War was fought over a similar issue, and I see no good reason for encouraging the theory of secession in labor organization. If the majority of the employees want to have a company union, that ought to be the representative organization, and I do not favor compelling the company to deal also with a national union representing a minority. The same principle applies when the situation is reversed.

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2017, the foregoing Brief of Amicus Curiae Service Employees International Union Local 32BJ was served on all parties or their counsel of record through the *CM/ECF* system.

/s/Brent Garren
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